

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 32**

(Concord and Walnut Creek, CA)

CONTRA COSTA NEWSPAPERS, INC.

Employer

and

Case 32-RC-5108

TEAMSTERS LOCAL No. 315,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding,¹ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find that the Employer, a California corporation engaged in the printing and distribution of daily newspapers, is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The parties' briefs have been duly considered.

3. The parties stipulated, and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks to represent a unit consisting of all full-time and regular part-time drivers and dock workers employed by the Employer at its Concord and Walnut Creek, California facilities, excluding all other employees, guards and supervisors as defined by the Act. At the hearing, the parties stipulated that the bargaining unit as described above is appropriate for collective bargaining under the Act. However, the Employer contends that the four individuals who perform work in the Employer's "Person-In-Charge" (PIC) classification are statutory supervisors within the meaning of Section 2(11) of the Act and must be excluded from the unit. The Petitioner contends that those employees are not supervisors under the Act and should be included in the unit.

THE EMPLOYER'S OPERATION

The Employer prints and distributes several daily and weekly newspapers. Its printing facilities are located in Concord and Walnut Creek, California. Daniel Smith, the Employer's Circulation Director, oversees the transportation and delivery of the newspapers. Don Dennler, the Employer's Transportation Manager reports directly to Smith and is assisted by Danny Frias, the Assistant Transportation Manager. Four dock supervisors, two from each facility, supervise the Employer's truck drivers and report directly to Frias. At the Concord facility, the dock supervisors are Carl Miller and

Priscilla McBeth. Ed Cissel and Paul Hargraves are the dock supervisors at the Walnut Creek facility.

Because of the dock supervisors' days' off and other responsibilities, there are typically about five to eight shifts per week when a dock supervisor is not available to supervise the work on the dock. To cover those shifts the Employer created the PIC classification. The Employer employs four PICs, and each of them typically spends one to two shifts per week as the person in charge of a shift, and works as a driver for the remaining three to four shifts per week.² Dale Beckstrom and Robert Dalinsky work in the PIC position at the Employer's Walnut Creek facility. Bronson Jones and Terry Davenport work in the PIC position at the Concord facility. The PICs, like the dock supervisors, report to Frias.

The Employer employs approximately 43 truck drivers, including the four who also perform work as PICs. About 25 of the drivers are assigned to the Employer's Walnut Creek facility and 18 are assigned to the Concord facility. The drivers report to a dock supervisor or a PIC.³

Each of the Employer's printing facilities has two daily production runs: the feature sections are printed in a "pre-run" from about 5:00 p.m. to 8:00 p.m. and time-

² When a dock supervisor is on vacation or off work due to illness, there are additional shifts when a dock supervisor is unavailable, and on those occasions, the individuals who work as PICs work a greater number of shifts as PICs.

³ Although the petitioned for unit includes both truck drivers and dock workers, there was no evidence presented at the hearing related to the specific job title "dock workers," and the parties' briefs refer to petitioned-for employees collectively as drivers or truck drivers. I note, however, that employee Craig Johnson, a truck driver for the Employer for about a year and a half, testified that he drives a truck on only about four of his five shifts per week. It appears that on the shift when Johnson is not driving, he is doing dock work, and presumably that type of work assignment is the basis for including a dock worker classification in the petitioned for unit.

In its brief, the Employer requests that the testimony of driver Craig Johnson be disregarded. I note that this is not an adversary proceeding, and I find no reason to discredit Mr. Johnson. I also note that there is little direct conflict between Johnson's testimony and that of the only other witness in this case, Daniel Smith.

sensitive news sections are printed in a “main run” from about 11:30 p.m. to 3:30 a.m. During a typical shift, the dock supervisor or PIC will have a crew of 8-10 drivers and is responsible for the loading and delivery of about 9-12 truckloads of newspapers.

During the “pre-run” and the “main run,” bundled newspapers are sent to the dock by conveyor belt, and drivers load the bundles into nest carts. Drivers then load the carts into their trucks, secure the carts and deliver the newspapers to one of roughly seven destinations, primarily the Employer’s distribution center warehouses. On some occasions, the drivers may deliver newspapers directly to a customer. Occasionally, drivers will also load and deliver newspaper delivery supplies, such as rain bags and rubber bands, to restock supplies stored at the distribution center warehouses. In some instances, drivers will make two, or even three, deliveries during a shift. Drivers do not have “permanent” routes; however, the record is not clear as to whether the drivers tend to drive the same routes on most nights.

Drivers generally work five shifts per week. Other than three drivers who work the day shift, the drivers work at night and normally work about four to six hours per shift. Some of the drivers begin work between about 9:00 p.m. and 9:30 p.m., which is shortly after the completion of the “pre-run” printing. Most of the drivers begin work between 10:00 p.m. and 11:00 p.m., which is shortly before the start of the “main run” printing. Drivers are paid by the hour, and their hourly rate is based on the drivers’ length of service with the Employer and on the drivers’ degree of experience.

The Employer has used PICs on and off for about 4 years. Drivers are selected to perform PIC duties by department managers based on the driver’s experience and demonstration of skill and competence. When working as a “person in charge” they

receive \$2.00 an hour above the hourly rate of pay they receive when working as drivers. Bronson Jones, a senior employee with approximately 15 years of experience with the Employer, earns a driver's wage of \$12.50 per hour. Jones began working as a PIC 6 to 8 months ago and works around one to two PIC shifts per week. Terry Davenport, a senior employee with about 20 years of experience with the Employer, earns a driver's wage of \$13.50 per hour. Davenport began working as a PIC approximately 1 1/2 years ago and works approximately one PIC shift per week. Robert Dalinsky, a driver with 5 to 6 years of experience with the Employer, earns a driver's wage of \$11.30 per hour. He began working as a PIC roughly 2 years ago and works approximately one to two PIC shifts per week. Dale Beckstrom, a driver with 2 to 2 1/2 years of experience with the Employer, earns a driver's wage of \$9.85 per hour. He began working as a PIC approximately a year ago and works roughly two PIC shifts per week.

When assigned to work as a person in charge, the PICs generally perform that work for an entire shift, which is from about 9:00 p.m. to 5:00 a.m.⁴ On occasion, PICs may deliver loads during their PIC shift; dock supervisors also occasionally make such deliveries. When not working as PICs, the four PICs work as drivers. As drivers, they perform the same work as regular drivers, but spend more of their time training new employees than do the regular drivers. When they are training new employees, the PICs are paid at their driver rates of pay, not at their PIC rate of pay.

⁴ Dock supervisors work five eight-hour shifts per week, roughly from 9:00 p.m. to 5:00 a.m.

POSITIONS OF THE PARTIES

The Employer contends that the four individuals who perform work as PICs are statutory supervisors within the meaning of Section 2(11) of the Act and therefore must be excluded from the unit. The Petitioner contends that the PICs are employees and that their work in the PIC position is akin to that of leadmen, not that of statutory supervisors. Accordingly, the Petitioner asserts that those employees are properly included in the unit.

ANALYSIS

The Applicable Law

Section 2(11) of the Act defines a supervisor as one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” The possession of any one of these primary indicia of supervisory authority, as specified in Section 2(11) of the Act, is sufficient to establish supervisory status, provided that such authority is exercised in the employer's interest, and requires independent judgment in a manner which is more than routine or clerical. Harborside Healthcare, Inc., 330 NLRB No. 191 (2000); Hydro Conduit Corp., 254 NLRB 433, 437 (1981). However, the exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status on employees. Chicago Metallic Corp., 273 NLRB 1677, 1689 (1985); Advanced Mining Group, 260 NLRB 486, 507 (1982). Moreover, because

supervisory status removes individuals from some of the protections of the Act, only those personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, set-up men and other minor supervisory employees." S.Rep.No. 105. 80th Cong. 1 Sec. 4 (1947); Ten Broeck Commons, 320 NLRB 806, 809 (1996).

The party asserting that individuals are supervisors under the Act bears the burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706, 121 S.Ct. 1861 (2001); Bennett Industries, Inc., 313 NLRB 1363 (1994); Tucson Gas and Electric Co., 241 NLRB 181 (1979). To meet this burden the party asserting supervisory status must provide sufficient detailed evidence of the circumstances surrounding the alleged supervisor's decision making process in order to demonstrate that the alleged supervisor was exercising the degree of discretion or independent judgment that is necessary to establish supervisory status. In Crittenton Hospital, 328 NLRB 879 (1999), the Employer argued that charge nurses were supervisors because they had the power to make mandatory overtime assignments or call in substitutes, based on their assessment of whether staffing was adequate. However, there was "no evidence showing how mandatory overtime or additional staffing needs are determined, or the process by which employees are selected for overtime or call-in."⁵ Thus, the Employer ... failed to demonstrate that RNs utilize independent judgment." Crittenton, 328 at 879. Similarly, in Harborside Healthcare, Inc., 330 NLRB 1334 (2000), charge nurses were not given any set order to follow in

⁵ A further reason for requiring details about the alleged supervisor's decision making process is that independent judgment cannot be found where decisions are strictly regulated by specific employer policy. Western Union Telegraph Co., 242 NLRB 825, 827 (1979). Thus, absent evidence regarding the nature and scope of the employer's policies, it would often not be possible to determine whether an alleged supervisor was actually exercising significant discretion.

offering overtime to potential replacement employees. Nonetheless, the nurses' call-in authority was not found to be supervisory in the absence of evidence disclosing how they decided which employees to call. Harborside, 330 NLRB at 1336.⁶ Moreover, the nurses' reliance on volunteers and their lack of authority to compel overtime work underlined the absence of supervisory power. See Harborside, 330 NLRB at 1336.

In this case, it is the Employer who is asserting that the PICs are supervisors, and therefore it has the burden of establishing the supervisory status of the PICs. For the reasons set forth below, I find that the Employer has failed to meet this burden, and I will therefore include the PICs in the unit.

Primary Indicia of Supervisory Authority

While the parties stipulated that the dock supervisors are statutory supervisors and effectively recommend the hiring of employees, the record establishes that PICs have no authority to hire, discharge, transfer, suspend, layoff, recall or effectively recommend such actions. The Employer takes the position that the PICs, Dale Beckstrom, Robert Dalinsky, Bronson Jones and Terry Davenport, are statutory supervisors because they have supervisory authority related to the assignment and direction of other drivers' work, can adjust employee grievances and can effectively recommend employee discipline and promotion.

Assignment and Responsible Direction of Work

The Employer states that PICs are responsible for making sure that a sufficient quantity of newspapers is delivered to the designated destinations within very strict time limitations. The Employer states that because of a number of factors that are beyond

⁶ See also Sears, Roebuck & Co., 304 NLRB 193 (1991); Quadrex Environmental Co., 308 NLRB 101 (1992), which also reject the use of mere inference or conclusionary statements without supporting evidence to establish supervisory status. .

the control of the PICs, their assignment and direction of work is not routine, and that the PICs must regularly exercise discretion and good judgment in order to meet the delivery deadlines. In this regard, the Employer states that the number of pages per edition, and therefore the weight of the newspapers printed, vary from run to run. PICs must decide how many papers will go on each truck in order to maximize the timeliness of the deliveries, but without going over the laws setting maximum weight allotments for delivery trucks. Therefore, the PIC must refer to load manifests, which set forth the specifications of each press run and show the number of newspapers to be delivered to each destination. After making the necessary calculations, the PICs tell the drivers how many bundles they are to load on their trucks.⁷ This aspect of the job appears to involve the application of basic arithmetic, and I conclude that such decisions do not involve the exercise of the type of discretion necessary to establish supervisory status.

Another decision that the Employer attributes to the dock supervisors and PICs is the assignment of driver routes. The Employer states that drivers do not have set routes and that dock supervisors and PICs decide for each shift which routes each driver will drive. The Employer's evidence of the PICs' authority and decision making process is based only on the testimony of its Circulation Director, Daniel Smith. Smith did not have day to day contact with the PICs or dock supervisors. In fact, he admitted that he only went to the loading dock about twice a month, and he did not state how long he was present on the docks on those occasions. Smith also did not state how

⁷ The evidence shows that the Friday and Sunday papers have many more pages than do the papers for the rest of the week. The evidence is not as clear concerning how significant the differences are between the newspapers that issue on each of the other five days of the week, or between those that issue on a particular day one week and the newspapers that issue on that same day the next week. Therefore, it is not clear how unique each day's run really is and how much calculating a PIC must do to determine how many bundles to put on each truck.

often, if ever, that he observed a PIC having to make decisions regarding work assignments and scheduling. Significantly, Smith did not provide examples of PICs deciding which routes each driver would take for a particular shift, and he conceded that he did not even know whether drivers usually drove the same routes. He also did not describe the Employer's policies and guidelines regarding such assignments, or the directions given to PICs regarding such assignments. Smith also did not provide evidence showing what factors a PIC would have to consider in making such assignments. Moreover, there is no reason to assume that, in making these decisions, the PICs are doing anything more than adhering to the well established routines of a long-running operation based on their experience and competence. The Employer's evidence also indicates that when PICs have to make decisions in more unusual or emergency situations, they seek guidance from upper management. As stated above, the Board will not find that a purported supervisor exercises the degree of discretion necessary to establish supervisory status unless there is specific evidence regarding how that person makes his/her "supervisory" decision, that is, what factors the purported supervisor considers and how much the decision is based on Employer imposed guidelines and established practices. Here, the Employer has provided only conclusionary evidence and has provided no evidence regarding how the PICs make route assignments. Thus, the Employer has not met its burden, and I conclude that the evidence does not establish that the PICs made route assignments based on the exercise of the degree of independent judgment that is required to establish supervisory status. Crittenton Hospital, above and Harborside Healthcare, Inc., above.

The Employer also states that for various reasons, the printing runs are late to some degree on many occasions, and sometimes they are very late. When the newspapers are late coming off of a run, the PIC must make adjustments, and according to the Employer, these adjustments require the exercise of considerable discretion. When a PIC notices that a printing run is late, the PIC contacts the Pressroom Manager to discuss the severity of the situation. According to Daniel Smith, based on the information from the Pressroom Manager, the PIC will have to decide whether to make adjustments to the loading and delivery schedules. Such adjustments are due to the fact that the distribution center warehouses cannot do any of their work preparing the newspapers for delivery until they receive the first load of newspapers. Thus, in order to enable a distribution center warehouse to begin its work preparing the newspapers for delivery, Smith states that a PIC could decide to send half filled trucks to the distribution center warehouses rather than waiting for enough papers to be printed to make a full load. According to Smith, the PIC could also decide to add another truck and driver for the shift.

The evidence does not establish that PICs make the decision regarding whether to send half filled trucks early based on their own initiative, or that making such a decision would require the exercise of the degree of discretion necessary to establish supervisory status. Similarly, the evidence does not establish that PICs have ever added another truck and driver for a shift, or that such a decision would be based on the exercise of significant discretion by the PIC. In particular, I note that there is no evidence detailing a particular situation in which a PIC made such decisions. There is also no evidence that management told PICs they were to independently make such

assignment and scheduling decisions when there is a print run delay; what guidelines the PICs were given to follow, or what factors they were to consider in making such a decision. In this regard, I again note that there is evidence indicating that the PICs contact their supervisor, Frias, and contact his supervisor, Dennler, regarding at least some of the more significant problems they are encountering on the night shift.⁸ It is also significant that Smith admitted that printing run delays are relatively common; that the decision to send half trucks is “fairly automatic” and is based on normal procedures learned from experience; and that when the printing run delay is an hour or longer, the PIC or dock supervisor is required to contact Smith. For the reasons set forth above, I conclude that the conclusionary evidence provided by the Employer does not establish that the PICs are making independent judgments requiring the exercise of significant discretion regarding how to respond to printing delays.⁹

On some occasions when a press goes down, production may be moved to the other facility. According to Smith, in such cases, the dock supervisor and/or PIC at both facilities, along with the other managers at both facilities, participate in a telephonic discussion regarding whether to move the production to another facility. Smith also testified that once the decision is made to switch production to another facility, the dock

⁸ Craig Johnson, a driver at the Walnut Creek facility, testified that when a press goes down dock supervisors will direct employees on the plan of action prior to contacting the managers, whereas PICs will contact managers prior to giving employees such direction.

⁹ As noted above, Smith testified that he receives about two telephone calls per month during the night shift from dock supervisors or PICs. It is not clear whether these calls were limited to situations where the printing run delay was for more than an hour or whether these calls involved other more significant emergencies. Smith testified that these calls were seeking his advice; that the caller described the problem and gave a proposed plan of action; and that Smith rejected the PIC/dock supervisors’ proposed plan on roughly a quarter of the occasions that he is called. Smith did not distinguish between the calls he received from PICs and dock supervisors, and gave no examples of calls he had received from a PIC in which he approved the PIC’s proposed plan of action. Therefore Smith’s testimony does not establish how often he accepted or rejected proposed plans of PICs, or whether any of the PICs’ proposed plans were based on the exercise of discretion by the PIC. In these circumstances, Smith’s testimony regarding these telephone conversations does not establish that the PICs are supervisors within the meaning of the Act.

supervisors or PICs have to make decisions regarding truck switching or load reconfigurations to make sure that the facility that is going to do the extra printing has sufficient delivery capacity.

Smith did not assert that he has ever participated in the telephone conversations about temporarily moving production and/or trucks and/or drivers to another facility, and he gave no evidence regarding particular conversations in which a PIC participated. Rather, Smith again gave mere conclusionary testimony.¹⁰ Smith also did not describe the Employer's policy guidelines regarding the decision to temporarily transfer a printing run, trucks and drivers to another facility. Therefore, there is no actual evidence establishing that a PIC has ever made any substantive recommendations, much less effectively recommended that production should be moved to another plant, or that a PIC has made or effectively recommended the decision that trucks and drivers should be temporarily re-assigned to the other facility. For the reasons set forth above, I conclude that the conclusionary evidence provided by the Employer does not establish that the PICs are making independent judgments requiring the exercise of significant discretion regarding how to respond to printing delays.

The Employer also states that PICs are empowered to make temporary schedule changes. For example, the Employer states that PICs may request that a driver stay longer, possibly working overtime. However, the evidence shows that the Employer

¹⁰ There are a relatively limited number of shifts that are covered by PICs, and it appears that it is not common for the Employer to have telephonic conference calls to consider whether to move a printing run and trucks. Therefore, there is no basis for inferring that a PIC has participated in print run and truck switching decisions, and there is clearly no basis for inferring that there have been such telephonic conference calls in which a PIC was participating on behalf of both facilities. I also note that in such telephonic discussions about moving production and trucks, if there was a dock supervisor participating from one facility and a PIC from the other facility, I would not infer that the PIC played a dominant or even equal role in the decisions making and would require specific evidence that the PIC, rather than the dock supervisor, was the one who effectively recommended the production switch or made the decision to temporarily transfer trucks or drivers.

does not have mandatory overtime, because it knows that its drivers have other jobs, which the Employer considers as their primary jobs. Moreover, the Employer's prime directive is to get as many of the required number of newspapers to each distribution center warehouse as close as possible to the distribution deadline, even if it means sending out half filled trucks, requesting employees to work overtime, etc. As stated above, making these decisions appears to require primarily an application of basic arithmetic to the Employer's long established practices. I also note that there is no evidence of specific situations in which a PIC requested an employee to work overtime, what factors the PICs would have relied on in making the decision to ask an employee to work overtime, or what oral or written guidelines managers gave to PICs with regard to when they could or should ask employees to work overtime. Thus, the Employer's conclusionary evidence on this issue is insufficient to establish the supervisory status of the PICs.

The Employer also provided conclusionary evidence that, when an employee calls in and leaves a message informing the dock supervisor or PIC that he/she will be an hour or two late, the dock supervisor and PIC have the authority to accommodate the employee's request. Similarly, the Employer provided conclusionary evidence that when an employee has left a message that he/she will not be at work that day, the dock supervisors and PICs have the authority to change assignments regarding which loads each employee will be delivering or to call in an off duty employee. Smith provided no examples showing that PICs actually made such decisions; that they make such decisions on their own without specific guidelines or input from managers; or that they make such decisions based on the exercise of significant discretion.

Even assuming that there were such evidence, as stated above, the Employer's prime directive is that the dock supervisor/PIC get as many of the required number of newspapers to each distribution center warehouse as close as possible to the distribution deadline, even if it means using less efficient/more costly means. When an employee is going to be late or not at work at all, the dock supervisor or PIC must "crunch the numbers;" that is, they must determine the number of papers to be delivered, the number of trucks and drivers available, and the amount of time left in which to make the deliveries. From a review of these figures, it will be readily apparent whether assignment changes or the addition of another driver will be needed in order to make the deliveries in a timely manner. As the PICs' primary obligation is getting the newspapers to the distribution center warehouses on time, the PIC is again making the decision on how to accomplish the timely delivery based on a combination of arithmetic calculations and well established Employer practices. In these circumstances, and for the reasons set forth above, the Employer's conclusionary evidence does not establish that these decisions require the exercise of sufficient discretion to warrant a finding of supervisory status.

According to the Employer, in situations where it is determined that an additional driver is needed, the dock supervisor/PIC would call off-duty drivers to work an extra shift and would exercise discretion in making that selection. The evidence shows that off duty drivers inform the Employer if they wish to be called to work extra hours, and that drivers are not required to accept the offer of extra work. The Employer also provides the dock supervisors and PICs a list of off duty drivers who are to be called for extra shifts.

The evidence does not establish that the selection of employees from the list is based on the exercise of discretion regarding the respective skills of the drivers and the nature of the work to be assigned. I note that there is no evidence that loading certain trucks requires certain special skills, that certain trucks require noticeably different driving skills than other trucks, or that certain routes require greater driving skills. There is some evidence showing that some employees on the list might be more experienced on particular routes; however, there is no evidence showing how significant this difference in experience would be, or that a PIC ever had to choose among employees with differing levels of experience on a route to which they would likely be assigned. In fact, Mr. Smith did not provide any evidence of specific situations in which a PIC called in an off-duty employee from the list, what factors the PIC actually relied on in making such decisions, or what oral or written guidelines/rules managers gave to the PIC regarding whom they should call first from the list. Therefore, the Employer's conclusionary evidence does not establish that PICs select off duty drivers from the Employer's list based on the exercise of a significant amount of discretion.

Smith also provided conclusionary evidence that PICs have the authority to allow drivers to leave work before the shift's delivery has been completed, even if that may further delay the Employer's delivery of the newspapers. Again, Smith did not give any examples of the exercise of this authority by a PIC, nor did he provide evidence of the guidelines that would apply in making such decisions. I also note that the evidence indicates that this type of decision would typically have to be made in situations when the presses are running 2 to 3 hours late and drivers need to leave in order to get to their other jobs. As noted previously, the record indicates that most drivers have

another job, which the Employer considers to be their “primary” job, and, as a matter of course, the Employer will give precedence to an employee’s primary job in the event of a schedule conflict.

The record also includes conclusionary evidence to the effect that when production and deliveries are running exceptionally well, PICs, like dock supervisors, may allow drivers to leave a shift early and in effect be paid for a half hour that they didn't work. According to Smith, this action would be effectuated by the dock supervisor or PIC signing off on an employee’s time card. The Employer has provided no specific examples of a PIC, as opposed to a dock supervisor, making such a decision, and the Employer provided no time cards showing that a PIC had signed off on an employee’s time card.¹¹ The evidence also does not demonstrate that a PIC would make such a decision without input from his superiors or without clear guidelines regarding how to make such decisions. For the reasons set forth above, I have again concluded that the Employer’s conclusionary evidence is insufficient to establish that the PICs make such decisions or that such decisions would require the exercise of the degree of discretion necessary to establish supervisory authority.

Authority to Discipline Employees

PICs document incidents involving possible employee misconduct and which may result in employee discipline. According to Circulation Director Smith, the PICs discuss employee misconduct incidents with the Transportation Manager and in those discussions may make recommendations about disciplinary action. According to Smith these recommendations are typically, but not always, followed. Smith did not testify that

¹¹ Craig Johnson, a driver with roughly a year and a half of experience with the Employer, testified that he has never received such authorization from a PIC, only from a dock supervisor.

he was ever present during the purported conversations between PICs and the Transportation Manager, and Smith did not give any examples in which a PIC effectively recommended that an employee be disciplined. Rather, the evidence shows that the decision to issue employee discipline and the implementation of that discipline are handled by the Transportation Manager and the Assistant Transportation Manager after conducting their own independent investigation of the incident. The incidents are then reported to Human Resources, which must approve of any disciplinary action taken and which may make its own independent investigation.

Although an individual's duties may include relaying to management complaints about other employees or reports of inefficiency, if higher management investigates these reports independently, the reporting employee is not a supervisor within the meaning of the statutory definition. Pepsi-Cola Bottling Co., 154 NLRB 490, 493-494 (1965); Beverly Health & Rehabilitation Services, 335 NLRB No. 54 (2001). Accordingly, I find that the Employer has not demonstrated that the PICs have authority to discipline or effectively recommend such action when they report disciplinary incidents or complaints to management. To the extent that their verbal reports may include their personal recommendations for discipline, they have not been shown to be effective recommendations, in that the Employer independently investigates the information reported.¹²

¹² Similarly, Smith testified that PICs have the authority to send employees home if they are acting erratically, and have the authority to effectively recommend that an employee be sent for a drug test. However, the record does not reflect whether any PICs have ever utilized this purported authority or were ever told that they had this authority. There is also no evidence regarding what guidelines and training PICs were given regarding such matters. Thus, the conclusionary evidence regarding the PICs supposed disciplinary/substance abuse detection is insufficient to establish that the PICs exercise that authority or that they did so based on the use of a significant degree of independent judgment.

Employee Evaluations, Promotions and the Adjusting of Employee Grievances

The Employer contends that the PICs evaluate the work of other drivers, have some authority to promote drivers and can adjust employee grievances. However, the record clearly establishes that the dock supervisors or the Assistant Transportation Manager, and not the PICs, prepare the employee evaluations, and that, at most, a PIC may be asked on occasion by the evaluator for his opinion of a particular employee's work. There is no evidence regarding whether other drivers are also asked for their input or what role the PICs' input actually plays in the ultimate evaluations that are prepared. There is also no evidence in the record that a PIC has ever been asked his opinion about what wage a driver should receive. In the absence of any evidence that the input from PICs affected other drivers' evaluations and wage increases in a direct or systematic way, the role of the PIC in the evaluations of other employees does not establish the PICs' supervisory status. See Elmhurst Extended Care Facilities, 329 NLRB No 55 (1999); Ten Broeck Commons, above.

With regard to promotions, the record clearly demonstrates that the Transportation Manager makes decisions regarding drivers' promotions. There is no specific example of a PIC recommending a promotion, or evidence showing that PIC recommendations regarding promotions were relied on and followed by the Employer. While PICs might recommend other drivers for promotion to PIC positions, the only specific example of a driver being promoted to a PIC position shows that the promotion was based on feedback from other supervisors and from regular drivers as well. In light of the conclusionary nature of the Employer's evidence, it has failed to meet its burden of establishing that the PICs exercise any supervisory authority with regard to employee

promotions, or that they provide input regarding promotions that is based on a sufficient degree of discretion to establish their supervisory authority.

The evidence is equally lacking with regard to the PICs' role in adjusting employee grievances. Daniel Smith testified that PICs have the authority to resolve grievances and employee complaints, but, when asked, was unable to provide any specific examples of PICs doing so. Johnson, a driver at Walnut Creek, testified that, to his knowledge, PICs do not resolve grievances. For the reasons set forth above, I find this conclusionary and contested evidence regarding the PICs' role in adjusting employee grievances to be insufficient to establish the PICs' supervisory authority.¹³

New Employee Training

PICs perform most of the Employer's new employee training. As stated above, they are paid their regular driver rate when performing such training. The training consists of orienting new employees to the dock area, the loading procedures, equipment and routes. New employees are also trained in paperwork used in the performance of drivers' work, including how to read the load manifests. New employees receive about 6 days of training, though they are not always trained by the same person for all 6 days. When not performed by PICs, new employee training is performed by other experienced drivers. Trainers verbally report to the managers on the progress of the training, though there is no specific evidence that PICs play an effective role in the Employer's decision to retain the new employees. When asked, Smith could not provide one example where a PIC made a recommendation regarding whether a trainee should be kept or discharged. Based on these facts, the PICs' responsibilities to train

¹³ Whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established, at least not on the basis of those indicia. The Door, 297 NLRB 601 (1990).

new employees appear to be derived from their experience with the Employer and their familiarity with the routes and paperwork . See Quality Chemical Incorporated, 324 NLRB 328 (1997); Brown & Root, Inc., 314 NLRB 19 (1994); Adco Electric, Inc., 307 NLRB 1113, 1126 (1992). Moreover, the conclusionary evidence presented by the Employer fails to establish that the PICs are making recommendations regarding the future of the trainees, much less that they are making effective recommendations based on the exercise of significant independent judgment.

Substitution for Dock Supervisors

Finally, the Employer asserts that PICs are statutory supervisors because they spend a regular and substantial part of their workweek engaged in supervisory duties and because they substitute for the dock supervisors in cases of illness or during vacations. The Board holds that “the appropriate test for determining the status of employees who substitute for supervisors is whether the part-time supervisors spend a regular and substantial portion of their working time performing supervisory tasks.” Aladdin Hotel, 270 NLRB 838, 840 (1984). While the PICs appear to spend a regular and substantial portion of their working time performing PIC duties, as described above, I do not find that such time is spent engaged in supervisory tasks, but instead is spent performing non-supervisory duties akin to the duties of leadmen. In addition, the majority of PICs’ work time is spent performing the routine tasks performed by all the drivers. While PICs may substitute for dock supervisors during periods of illness and vacations, and when acting as PICs perform many of the same daily duties as dock supervisors, there is no evidence that PICs assume the “dock supervisor” position and the record does not establish that the nature and extent of the PICs’ authority is

equivalent to that of the dock supervisors. See Passavant Health Center, 284, NLRB 887, 892 (1987); Doctors' Hospital of Modesto, 183 NLRB 950, 951-952 (1970).

In sum, I find that the evidence concerning each of the individual indicia set forth above, and all of that evidence considered collectively, does not support a finding that the PICs are supervisors within the meaning of Section 2(11).

Secondary Indicia of Supervisory Authority

In addition to the duties described above, the Employer points to some secondary indicia to support its contention that PICs are statutory supervisors; in particular, it relies on the PICs' higher pay rate and the assertion that the drivers would be without direct supervision if the PICs are not found to be supervisors. Secondary indicia of supervisory authority may be relied upon only in a close case where some evidence indicates the existence of primary indicia. See GRB Entertainment, 331 NLRB No. 41 (2000); Billows Electric Supply, 311 NLRB 878 fn. 2 (1993). When there is no evidence that at least one of the primary statutory indicia of supervisory status exists, such as here, the existence of secondary indicia, no matter how prevalent, is insufficient to establish supervisory status. S.D.I. Operating Partners, 321 NLRB at 112; J.C. Brock Corp., 314 NLRB 157, 160 (1994); St. Alphonsus Hosp. and Office and Professional Employees Int'l Union, 261 NLRB 620, 626 (1982). However, even if this were otherwise a close case, for the reasons set forth below, I would find that the Employer's evidence related to the secondary indicia to be unpersuasive.

Higher Pay

While PICs earn an additional \$2.00 per hour above their driver wage rate when performing PIC work, the wide range of wage rates earned by the PICs is largely

determined by their length of service and experience. In fact, long term drivers are paid more per hour than the least senior PIC is paid for his PIC work. Furthermore, other than the additional \$2.00 per hour, there is no evidence that PICs' benefits and working conditions are any different than those of the other drivers. I also note that the dock supervisors, who are stipulated to be statutory supervisors, are salaried, unlike the PICs. In any event, the fact that the PICs earn a small stipend for carrying out additional duties does not in and of itself establish supervisory status. Auto West Toyota, 284 NLRB 659 (1978).

Absence of Direct Supervision

The Employer asserts that if the PICs are not found to be supervisors then there would be numerous shifts where there would be no supervision of the drivers. However, when PICs are working there are other managers at the facility, sometimes including a dock supervisor who is at the facility but fulfilling other duties. Also, the evidence shows that the PICs have contacted the departments' senior managers for direction and guidance on issues that arise during the shift. Moreover, as Johnson testified, the bulk of the work performed by the drivers is routine, and they know from experience what they are supposed to do. I have concluded that the lack of direct supervision is insufficient to establish the supervisory status of the PICs. See e.g., J.C. Brock Corp., 314 NLRB 157 (1994) (unrealistic result of 40 employees to 1 supervisor not determinative of supervisory status in the absence of statutory indicia).

In sum, I conclude that the secondary indicia of supervisory authority, considered together, do not support a finding that the PICs are supervisors within the meaning of Section 2(11). In addition, I find it would not be appropriate to rely on the evidence of

the secondary indicia in making the decision in this case, because I do not find the evidence regarding the primary indicia to be sufficiently compelling to justify a consideration of the secondary indicia of supervisory status. GRB Entertainment, above; Billows Electric Supply, above. Instead, I find that the Employer has failed to meet its burden of showing that PICs have authority, in the interests of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action in a manner which is not merely routine but requires independent judgment. In the absence of such a showing, I find that there is insufficient evidence to establish that the PICs are statutory supervisors. See GRB Entertainment, above; Billows Electric Supply, above.

Based on the foregoing and the record as a whole, I shall direct an election among the following employees:

All full-time and regular part-time drivers and dock workers, including drivers working in the “person-in charge” positions, employed by the Employer at its Concord and Walnut Creek facilities, excluding all other employees, guards and supervisors as defined by the Act.

There are approximately 43 employees in the above-described unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board’s Rules and Regulations.¹⁴ Eligible to vote are those in the unit who are employed during the payroll period ending

¹⁴ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by TEAMSTERS LOCAL No. 315, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing

the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before **February 18, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington, D.C., by **February 25, 2003**.

DATED AT Oakland, California this 11th day of February, 2003.

Alan B. Reichard
Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, CA 94612-5211

32-1260

177-8560-1000
177-8560-4000

177-8560-6000